Supreme Court of the United States

OCTOBER TERM, 1961

No. 598

DRAKE BAKERIES INCORPORATED,

Petitioner,

against

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL AFL-CIO, and LOUIS GENUTH, Secretary-Treasurer, LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO,

Respondents.

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported in 196 F. Supp. 148 (R 20-22). The original opinion of the United States Court of Appeals for the Second Circuit is reported in 287 F. 2d 155 (R 38-45). The opinion of the United States Court of Appeals for the Second Circuit *en banc* is reported in 294 F. 2d 399 (R 59-60).

Jurisdiction

The judgment of the Court of Appeals was entered on September 12, 1961 (R 61).

A petition for a writ of certiorari was filed on December 11, 1961 and granted on January 22, 1962 (R 62). The jurisdiction of this Court is invoked under 28 USC Section 1254 (1).

Statute Involved

Section 301, Labor Management Relations Act of 1947; 29 USC §185, 61 Stat. 156:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> "(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.
>
> "(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are en-

gaged in representing or acting for employee members.

"(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

"(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

Questions Presented

1. Were respondents entitled to have petitioner's action, brought under Section 301 (a) of the Labor Management Relations Act of 1947 for violation of a no-strike clause contained in the collective bargaining agreement between the parties, stayed pending arbitration?

2. Did the even division of the active Judges in the Second Circuit upon reargument *en banc* affirm the original decision of the Court of Appeals for the Second Circuit or the decision of the District Court for the Southern District of New York?[1]

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1. Although this question is theoretically presented by this case and was one of the questions presented for review in the petition for a writ of certiorari herein, its practical significance for this case has been eliminated by this Court's granting a writ of certiorari in *Sinclair Refining Co.* v. *Atkinson*, *No. 434*. (This case has been set down for argument immediately following the *Sinclair* case.) The *Sinclair* case presents the same first question without presenting the second question. Thus, this Court in determining the *Sinclair* case must of necessity resolve the substantive issue in this case. After such a determination, the second question becomes moot. Whatever the effect of the Second Circuit's split, that effect will be clearly superseded by the determination of this Court. Accordingly, this question will not be argued.

Statement

Respondent Local 50, American Bakery & Confectionery Workers International AFL-CIO (hereinafter referred to as the "Union") is the collective bargaining representative for certain employees of Petitioner Drake Bakeries Incorporated (hereinafter referred to as "Drake"). (R 10)

Drake and the Union are parties to a collective bargaining agreement regulating their respective rights and obligations. (R 10) This collective bargaining agreement includes the following pertinent provisions setting forth the grievance and arbitration machinery:

> "ARTICLE V—GRIEVANCE PROCEDURE
>
> (a) The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly.
>
> In the adjustment of such matters the Union shall be represented in the first instance by the duly designated committee and the Shop Chairman and the Employer shall be represented by the Shop Management. It is agreed that in the handling of grievances there shall be no interference with the conduct of the business.
>
> (b) If the Committee and the Shop Management are unable to effect an adjustment, then the issue involved shall be submitted in writing by the party claiming to be aggrieved to the other party. The matter shall then be taken up for adjustment between the Union and the Plant Manager or other representative designated by management for the purpose. If no mutually satisfactory adjustment is reached by this means, or in any event within seven

(7) days after the submission of the issue in writing as provided above, then either party shall have the right to refer the matter to arbitration as herein provided. (R 6-7)

"ARTICLE VI—ARBITRATION

(a) The Arbitrator shall be designated by the New York State Board of Mediation upon the written request of either the Employer or the Union.

(b) The Arbitrator shall consider each case solely on its merits and this contract shall constitute the basis upon which the decision shall be rendered. The Arbitrator shall have no power to alter, amend, revoke or suspend any of the provisions of this contract.

(c) The decision of the Arbitrator shall be binding upon both parties for the duration of this contract.

(d) Should any party fail, upon written notice, to appear before the Arbitrator, in any matter submitted for arbitration as herein provided, the Arbitrator may proceed with the hearing, and render his decision upon the testimony and evidence presented, which decision shall be binding and shall have the same force and effect as if both parties were present.

(e) The arbitrator's decision shall be based only on evidence presented to him in the presence of both parties or otherwise made available to both parties." (R 7)

A specific no-strike clause was also contained in the collective bargaining agreement:

"ARTICLE VII—NO STRIKES

(a) There shall be no strike, boycott, interruption of work, stoppage, temporary walk-out or lockout

> for any reason during the terms of this contract, except that if either party shall fail to abide by the decision of the Arbitrator, after receipt of such decision, under Article 6 of this contract, then the other party shall not be bound by this provision. • • •" (R 8)

On December 16, 1959 Drake announced to the Union Committee and to its employees that in order to meet competition it was scheduling production for the Saturday after Christmas, December 26, 1959, and the Saturday after New Year's Day, January 2, 1960. (R 11-12, 15-16) Despite the fact that the company clearly had the right to reschedule production, both as an inherent management prerogative and specifically under the collective bargaining agreement, the Union objected to the rescheduling. (R 12-15) Instead of utilizing the grievance machinery available to it under the collective bargaining agreement, the Union chose to cause its members to engage in a one-day strike on January 2, 1960 in violation of both the no-strike clause of the contract and the grievance and arbitration machinery provided for in the contract. (R 16-18). The Complaint herein alleges that the Union "authorized, instigated and encouraged" its members to engage in this one-day strike (Par. Eighth, R 4).

For the purposes of this appeal, we need not consider the merits, if any, of the Union's contention that management had no power to schedule work, since the Union had available to it under the contract appropriate grievance machinery. Instead of utilizing the contractual mechanism for presenting and resolving its grievance, however, the Union chose to cause its members to engage in a one-day strike on January 2, 1960 in flagrant violation of both the contract's no-strike clause and its grievance and arbitration machinery. The breach is particularly inexcusable since the Union had ample time from December 16, 1959 until January 2, 1960 to institute appropriate grievance

proceedings. Instead, it chose to interrupt production by relying on its economic strength to afford it illegal self help.

Drake promptly instituted this action under Section 301 in the United States District Court for the Southern District of New York seeking damages for that breach of the no-strike clause. (Complaint R 2-4) The Union made a motion to stay the proceedings herein pending arbitration. (R 5) This motion was granted by Chief Judge Sylvester Ryan. (R 20-22) Drake thereupon appealed to the United States Court of Appeals for the Second Circuit. A panel consisting of Judges Swan, Lumbard and Moore unanimously decided that the breach of the no-strike clause was not covered by the arbitration clause of the contract and, hence, the Union's motion for a stay was improperly granted. (R 38-45)

The Court of Appeals for the Second Circuit granted the Union's motion for reargument *en banc*. (R 57) Upon such reargument, the six active judges of the Second Circuit were evenly divided, Judges Lumbard, Moore and Friendly voting to sustain the original determination of the Court of Appeals and Judges Clark, Waterman and Smith voting to reverse that determination and restore the District Court decision. The entire Court, by a 4 to 2 vote, then determined that the effect of this evenly divided Court was to affirm the District Court decision rather than the original Court of Appeals decision. (R 59-60)

Summary of Argument

1. As recognized by the drafters of Section 301 and this Court, the no-strike clause of a collective bargaining agreement has unique importance as the employer's only benefit from that agreement. Accordingly a breach of a no-strike clause deprives an employer of the only consideration he received from the agreement. Further, since

the grievance and arbitration machinery is provided by a collective bargaining agreement in order to prevent the settling of grievances through industrial warfare, such a strike violates the grievance and arbitration clauses as well.

It was the intent of the framers of Section 301 to provide judicial redress for such violations as manifested by the legislative history of that section. Since these framers must have been aware of the near universality of arbitration clauses, they could not have intended that such an arbitration clause could defeat judicial relief. An arbitrator, by virtue of his status, is not the proper person to enforce a no-strike clause. Further, Congress, by providing certain agency rules applicable to Section 301 actions generally but which are pertinent usually only in actions involving breaches of a no-strike clause, indicated it did not intend to require that actions for a breach of a no-strike clause must be arbitrated. These considerations have resulted in a near unanimity of opinion among the courts which have considered this question.

2. A union's breach of a no-strike clause is so fundamental a breach of the grievance and arbitration clauses that it should not be allowed to invoke these clauses to protect it from judicial sanctions against the very same violation. This is analogous to waiver of the right to arbitrate by other less basic violations of the arbitration clause. This has been recognized by several courts and is not inconsistent with other court decisions based upon the scope of the arbitration clause. This argument is based upon the unique importance of a no-strike clause and does not apply to any other clause of the collective bargaining agreement.

3. The arbitration mechanism of the contract is not suited for enforcing no-strike clauses. Hence the courts

have almost invariably held that a breach of a no-strike clause is not within the scope of an arbitration clause. This was in no way affected by this Court's decisions in the *Steelworkers* cases. Indeed those cases demonstrate the need for the courts' enforcing the employer's side of the collective bargaining agreement as they enforced the union's side in the *Steelworkers* cases. Furthermore the scope of the arbitration clause should be interpreted so as to best promote industrial peace and hence to allow judicial redress for breaches of no-strike clauses.

ARGUMENT

I

Basic Considerations.

The issue presented by this case is one of fundamental importance in labor law. It concerns the breach of a no-strike clause and the flouting of the grievance and arbitration machinery provided for by the contract. This is not only one of the most serious situations in labor-management relations, but also, as we will demonstrate below, a problem basic to the drafters of Section 301. Accordingly before discussing the various legal rationales which support petitioner's position herein, we will first discuss why a decision in favor of the petitioner will strengthen industrial peace—the Congressional purpose for Section 301.

The basic analysis of Section 301 is, of course, this Court's opinion in *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448 (1957). In that case this Court, at page 454, quoted the language of Senate Report No. 105, 80th Congress, 1st Session, p. 16, in order to reveal the Congressional intent in passing Section 301:

> "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is a little reason why an employer would desire to sign such a contract.
>
> Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts. * * *"

It would appear that Senators who drafted the clause which ultimately became Section 301, regarded a no-strike clause as the core of any collective bargaining agreement. In order to provide for the judicial enforcement of such clause, it set up the Federal forum provided in Section 301.

This Congressional view of the basic importance of the no-strike clause to orderly collective bargaining was shared by this Court. Thus, it stated on p. 455 of the *Lincoln Mills* case, *supra:*

> "Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way."

This Court predicated its more recent decisions on this subject largely on this relationship. Thus, in *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960) this Court made clear in a case involving both a grievance procedure culminating in arbitration and a no-strike provision (as in the instant case):

> "The present federal policy is to promote indusrial stabilization through the collective bargaining agreement. Id., 353 at 453, 454 (referring to *Lincoln Mills, supra.*) A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.[4]

"4. Complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement being the 'quid pro quo' for the agreement not to strike. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 1 L. ed. 2d 972, 77 S. Ct. 912" (p. 578).

This Court thus again stated that the arbitration and grievance provision of a contract gain their crucial importance because they are a necessary corollary to a union's relinquishing its right to strike during the term of the collective bargaining agreement.

Indeed, in the same case at p. 583, this Court held:

> "A collective bargaining agreement may treat only with certain specific practices, leaving the rest to management but subject to the possibility of work stoppages. When, however, an absolute no-strike clause is included in the agreement, then in a very real sense everything that management does is subject to the agreement * * *"

Thus, it is precisely on this assumption of the equally crucial importance to the employer of "an absolute no-

strike clause", that the epochal decision in *Lincoln Mills* made federal law applicable to Section 301 cases, and on behalf of the union specifically permitted enforcement of arbitration clauses contained in collective bargaining agreements. On the same assumption, the *Warrior & Gulf* opinion stated "everything that management does is subject" to the arbitration clause.

It follows inevitably that if the union's side of the "quid pro quo" requires judicial redress under Section 301, then the employer's side of the "quid pro quo"—the no-strike clause, certainly does.

In the light of the Congressional intent and this Court's prior decisions, what are the consequences of a strike in violation of a no-strike clause?

First and foremost, it deprives the employer of virtually the only benefit which he obtains from a collective bargaining agreement, namely, a certain period of labor peace free from strikes and other work interruptions. Such a strike, therefore, does nothing less than deprive the employer of the only fruits he gains from a collective bargaining agreement. This would be patently so even it were not so vigorously expressed by both Congress and this Court as Federal policy. Clearly, the collective bargaining agreement was so intended in this case.

The no-strike clause aside, this Court in the recent *Warrior & Gulf* case, *supra,* again and again emphasized that the grievance and arbitration machinery is created to prevent the self-help of economic power for the duration of the agreement. (The remedy for the breach of such machinery is supplied by 301.)

Thus:

> "Here arbitration is the substitute for industrial strife." (p. 578)

and again

> "For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement * * *." (p. 582)

Actually, then, a strike not only violates the no-strike clause of a collective bargaining agreement, but the grievance and arbitration procedure as well. This is so because the grievance procedure implies a method of resolving grievances which is not only inconsistent with the use of economic power but indeed created expressly to prevent such use.

The Federal courts have recognized this when they have held that where a collective bargaining agreement contains appropriate grievance procedure, a strike is illegal even in the absence of a specific no-strike clause. In *International Brotherhood of Teamsters* v. *W. L. Mead, Inc.*, 230 F. 2d 576 (1st Cir. 1956), the Court of Appeals for the First Circuit at 538-584 held:

> "As stated by Chief Judge Parker in *United Construction Workers* v. *Haislip Baking Co.*, 4 Cir., 1955, 223 F. 2d 872, 876-877, certiorari denied, 1955, 350 U. S. 847, 76 S. Ct. 87:
>
> > 'It is argued that a strike could not constitute a breach of a contract which did not contain a no-strike clause; but we think it clear that the purpose of the contract was to require the settlement of disputes and grievances by a procedure which would not cause a disruption of business that would necessarily result from a strike and that a strike without following such procedure was necessarily a breach.'
>
> "We think such was in effect the decision in *N.L.R.B.* v. *Sands Mfg. Co.*, 1939, 306 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 682, where a strike was

deemed to be a breach of a collective bargaining agreement which did not contain an express no-strike clause, and thus was not a protected collective activity, with the consequence that action by the employer in discharging such strikers was held not to be an unfair labor practice under §8 (3) of the National Labor Relations Act. To the same effect see *N. L. R. B.* v. *Dorsey Trailers, Inc.*, 5 Cir., 1950, 179 F. 2d 589.

"There is strong support among secondary authorities for the view that arbitration provisions in a collective bargaining agreement, of the sort here involved, should be read as implying a covenant on behalf of the union not to call a strike in derogation of the arbitration procedures. See Cox, 'Some Aspects of the Labor Management Relations Act, 1947', 61 Har. L. Rev. 274, 308-09 (1948); Daykin, 'The No-Strike Clause', 11 U. Pitt. L. Rev. 13, 34 (1949); Wolk and Nix, 'Work Stoppage Provisions in Union Agreements', 74 Mo. Labor Rev. 272 (1952); BNA, Coll. Barg. Negot. Serv. 15:325 (1954)."

This reasoning was also adopted in *Lewis* v. *Benedict Coal Corp.*, 259 F. 2d 346 (6th Cir., 1958), *aff'd*, 361 U. S. 459 (1960), and *Gay's Express, Inc.* v. *International Brotherhood of Teamsters*, 169 F. Supp. 834 (D. Mass. 1959). Moreover in the very agreement here involved, the parties have expressly provided in the grievance machinery provision "that in the handling of grievances there shall be no interference with the conduct of the business." (R 7)

In addition to the Federal cases cited above and the authorities cited therein, this Court has already indicated in *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R.R.*, 353 U. S. 30 (1957) that where Congress had provided a method for settling grievances, it would sustain the enjoining by a Federal court of direct strike action. As stated by a serious student of the law of labor

relations, Charles O. Gregory, in **The Law of the Collective Agreement,** in referring to the *Chicago River* case, at p. 645:

> "I think a contract provision for arbitration whether or not there is a no-strike clause, might be held as analogous to the Congressional provision for handling grievances in that situation."

This result is a necessary corollary of *Lincoln Mills* and *Warrior & Gulf*. Needless to say, where, as here, there is a specific no-strike clause, as well as contractually provided grievance and arbitration machinery, then the illegality of a strike during the term of the collective bargaining agreement is even more beyond dispute.

We reiterate that grievance and arbitration procedure exists in a collective bargaining agreement to prevent industrial warfare and the resolution of the issues that arise in the day-to-day operations of an industrial plant by naked economic strength; it does not exist to afford a remedy for the very institution of the warfare it is designed to prevent.[2] That remedy, we submit, was supplied by Congress when it passed Section 301.

It will be recalled that the United States Senate, in its report on what eventually became Section 301, stated the following:

> "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective

2. In this respect it differs fundamentally from the arbitration machinery provided for in a commercial contract.

> method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.
>
> "Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts."
>
> Quoted as authority, *Lincoln Mills*, *supra*, at p. 454.

Clearly, the drafters regarded a no-strike clause as the focal point of a collective bargaining agreement. In order to provide for the judicial redress for the violation of such clause, it passed Section 301.

We submit that any argument to the contrary would rest upon the unrealistic assumption that the drafters of Section 301, one of the most important sections of the Taft-Hartley Act, after laboring in committee for many hundreds of hours and after becoming totally immersed in the realities of labor relations, were ignorant of the patently obvious fact that collective bargaining agreements almost invariably contain grievance and arbitration procedure.[3] For if respondent is correct and a Section 301 action for a breach of a no-strike clause may be stayed pending arbitration, then Section 301 is absolutely meaningless to effect its primary purpose—the deterrence of industrial strife by providing a Federal judicial remedy for breach of the two unique and crucial provisions of any collective bargaining agreement, namely, the promise of

3. 99 per cent of the contracts studied by the Bureau of National Affairs contain some grievance procedure. Indeed, 100 per cent of the contracts in manufacturing establishments contain grievance procedures. Further, 94 per cent of all contracts provide for arbitration. 2 Collective Bargaining Negotiations and Contracts. pp. 51:1, 51:7 (Bureau of National Affairs).

the union not to strike and the promise of the employer to arbitrate grievances.

It might perhaps be contended that an employer's remedy under 301 is limited only to that similarly afforded to a union, namely, specifically to enforce the agreement to arbitrate as was done in *Lincoln Mills*. Obviously such a contention completely ignores both the realities of the situation, as well as the law itself.

In terms of practical labor relations, it cannot be contended that the right of redress before an arbitrator against a union for violation of a no-strike provision, provides any effective deterrent against such action. The plain fact is that the nature of the continuing collective bargaining relationship under a contract and the role of the arbitrator to peacefully keep that relationship intact, is such that an arbitrator cannot effectively impose a severe sanction on either the employer or the union. He is not a judge but a peacemaker. As the late Dean Shulman, a distinguished labor arbitrator, stated:

> "A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement. They are entitled to demand that, at least on balance, his performance be satisfactory to them, and they can readily dispense with him if it is not." Shulman, "Reason, Contract, and Law in Labor Relations", 68 Harv. L. Rev. 999, 1016 (1955).

Quoted in part as authority, *United Steelworkers* v. *Warrior & Gulf, supra,* at page 581.

Similarly, another student of labor law also realized the realities of a labor arbitrator's position preclude him from meting out justice when a union has breached the no-strike clause.

> "Normally, the only contract term the employer wishes to enforce by outside sanction is the no-strike clause. Assuming the union's good faith, both parties desire this clause enforced without delay—the union has a special interest in its enforcement if there is liability in damages for its breach. An arbitrator cannot enforce a no-strike clause and probably is not the proper person to assess damages for its breach. Enforcement of a no-strike clause is best left to the courts and assessment of damages to the jury." Francis W. Lowden, Jr., "Labor Arbitration Clauses: Draftmanship Avoids Litigation," 43 Va. L. Rev. 197, 202-203 (1957).

We respectively submit that these realities make clear that the only effective deterrent again the flouting of the machinery provided in a collective bargaining agreement to prevent industrial strife, is for a Federal District Court, which is in the words of Dean Shulman "a public tribunal imposed upon the parties by superior authority which the parties are obligated to accept", to enforce the no-strike provision.

Moreover, the language of the statute certainly makes clear that it was not intended that 301 be legislation restricted solely to enforce arbitration clauses and arbitration awards. For example, Section 301 not only sets up a Federal judicial forum for "suits for violation of contracts between an employer and a labor organization • • •", but also sets forth several rules of law which are applicable to such suits. Sections 301(b) and 301(e) set forth rules of law governing when a party is to be bound by the acts of its agents. Obviously, these agency

rules contained in 301(b) and (e) primarily are applicable in no-strike clause cases. They thus envisage law suits for violation of a no-strike clause under the Act, rather than for their arbitration, since no rule of law can ever bind an arbitrator. This clearly indicates that Congress, which not only must have known of the almost universal use of grievance and arbitration clauses in collective bargaining agreements but also specifically encouraged their use in this very same act, (§203(d); 29 U.S.C. §173(d), 61 Stat. 153) intended the Federal courts, rather than an arbitrator, to be the forum to enforce the no-strike clause and set up certain rules of law binding upon these courts. Indeed, the Federal courts have again and again granted damages to an employer for breach of the critical provisions of the no-strike clause and arbitration procedures.

That judicial action instituted by a union against breach of the grievance and arbitration procedure is proper under Section 301, was made clear in *Lincoln Mills, supra*, when an employer violated the procedure. That it should be equally available to the employer when the union violates the "quid pro quo" it promised, i. e. the no-strike provision, is but a matter of elemental fairness and sound labor relations and moreover, supported by a wealth of judicial authority.

As will be discussed in detail below, every Court of Appeals which has considered this problem (except for the Second Circuit, from which this appeal is taken) has held that a breach of a no-strike clause is actionable under Section 301 whether or not there is an applicable arbitration clause. Some courts have relied upon the fundamental inconsistency in allowing a union to shield itself behind the grievance and arbitration provision which it has flagrantly violated. Others have emphasized the scope of the arbitration clause. Still other courts have reached

the same conclusion without formally adopting either of the two rationales. But in any event the result is the same. We submit the reason for this practical unanimity is the basic considerations of industrial peace we have set forth above.

This is perhaps best illustrated by the original opinion of the Second Circuit herein. There, the Court presented a discussion of the crucial importance of the no-strike clause before rendering its decision based upon the scope of the arbitration clause in question (R 43-44). It therefore recognized that the fundamental question in any 301 suit is what alternative will best suit industrial peace. We submit that the only possible answer is the providing of a Federal judicial forum to punish the person who breaches the industrial peace.

II

A strike is so fundamentally inconsistent with the grievance and arbitration machinery that a union should not be permitted to invoke the very machinery it has violated in order to thwart Congressionally afforded judicial redress for such violation.

When the Union herein decided to ignore the grievance and arbitration machinery in resolving its dispute about scheduling with Drake and instead decided to use the self help of an illegal strike, we submit that it "waived" its rights to protect such illegal action by the very clause it had just violated. It is impossible to conceive of a more emphatic rejection of an arbitration clause than the resort to an illegal strike in order to settle a grievance that would normally be arbitrated under the contract. Whether the legal rationale is denominated waiver, default, estoppel or some other characterization, a strike is so fundamentally inconsistent with the griev-

ance and arbitration machinery that the Union should not be allowed to invoke the very machinery it has violated in order to thwart the Congressionally afforded judicial redress for that very violation. The Union cannot first unilaterally substitute a strike for the grievance and arbitration procedure and then, when it suits its convenience, utilize such procedure as a shield against judicial redress for that very same misconduct.

This has been recognized by certain Federal courts who have clearly held that a union by striking, in breach of the arbitration clause, forfeits the power to compel arbitration of that strike. While these cases have been based on a rationale implying estoppel, forfeiture or waiver of rights, the courts have stressed basic policy considerations rather than any one rationale.

These cases are, in a sense, analogous to other cases where a union or an employer has been held to waive its rights to arbitration by a failure to comply with some procedural requirement of the particular arbitration clause involved. Thus, in *Brass & Copper Workers Union* v. *American Brass Co.*, 272 F. 2d 849 (7th Cir. 1959), a union was held to have waived its rights to demand arbitration when it submitted its grievance to arbitration 13 days after the company's final answer, instead of during the 10-day period provided for in the contract. See also *Boston Mutual Life Insurance Co.* v. *Insurance Agents' Int. Union*, 258 F. 2d 516 (1st Cir. 1958) and *Council of Western Electric Technical Employees* v. *Western Electric Co.*, 238 F. 2d 892 (2nd Cir. 1956). If a union could lose the right to arbitrate by such a trivial violation as a 3-day delay in submitting a grievance to arbitration, it should certainly lose its right when it goes on strike, rather than submit a grievance to arbitration. A more flagrant disregard of the arbitration clause would be impossible to conceive.

Accordingly, the courts have found a union not entitled to utilize an arbitration clause after a strike — the most fundamental violation possible of such an arbitration clause.

In *Cuneo Press* v. *Kokomo Paper Handlers' Union*, 235 F. 2d 108 (7th Cir.), *cert. denied*, 352 U. S. 912 (1956), the Seventh Circuit denied a motion similar to the one at bar. In that case the defendant union, like the Union in the instant case, "at no time made any attempt to submit any agreement or complaint to arbitration, but on the contrary proceeded to call [a] strike without warning or notice to plaintiff" (at p. 111). The Seventh Circuit stated:

> "If the unions had grievances, it is apparent that they ignored the grievance procedure, as well as the provision for arbitration. Instead they instituted a sit-down strike which was disruptive of plaintiff's business and the work of its employees. That action was in direct conflict with the arbitration procedure called for by the contract. Indeed, the unions in their brief herein quote the following language from Lewittes & Sons v. United Furniture Workers, D. C. 95 F. Supp. 851, at p. 856:
>
> > "'Where the parties manifest a purpose to dispose of their disputes by arbitration rather than resort to the use of economic force or pressures, their agreements should be liberally construed with a view towards the encouragement of arbitration. • • • The Courts should be reluctant "to strike down a clause which appears to promote peaceful labor relations rather than otherwise.'"
>
> "The unions chose to act suddenly and without warning in using the economic force or pressure of a sit-down strike. Obviously, a chief purpose of the arbitration agreement was to avoid a strike.

> When the unions embarked upon the strike they voluntarily by-passed arbitration. When they struck the wrong was done and the damage to plaintiff began. Then it was that plaintiff's right of action for damages and injunctive relief to prevent further damage accrued.
>
> "Faced with plaintiff's suit for injunction and damages, the unions sought a stay order pursuant to Section 3 of the Arbitration Act. However, their position at that time was untenable • • • Even if the unions originally had an issue referable to arbitration, they chose instead to resolve that issue in their favor by use of their economic strength. Having thus violated their contract to plaintiff's damage it was too late for them to demand arbitration on that issue." (At pp. 111-112)

The reasoning of the Seventh Circuit is equally applicable here.

The First Circuit has also held that a strike in violation of the grievance and arbitration provision, even in the absence of a no-strike clause, deprives a union of any power to compel arbitration of that strike. In *W. L. Mead, Inc.* v. *International Brotherhood of Teamsters*, 126 F. Supp. 466 (D. Mass., 1954); 129 F. Supp. 313 (D. Mass., 1955), *aff'd*, 230 F. 2d 576 (1st Cir., 1956), the District Court, finding that a strike was tantamount to a refusal to arbitrate, concluded (129 F. Supp. 313, at 315):

> "I do not find that, as now contended by the defendant, the plaintiff had a duty to arbitrate the strike. The defendant having broken its contract and gone on strike because it refused to arbitrate an individual dispute, is not in a position to contend that the plaintiff should then have insisted on arbitrating the strike as well."

Clearly, an important and relevant consideration to the Court of Appeals in affirming, was the policy of promoting

industrial stability. The Court was influenced by the fundamental labor policy first enunciated in *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332 (1939) which held that strikes in violation of specific contractual provisions were "unprotected" by the National Labor Relations Act. In examining the unfair labor charges emanating out of the *Mead* dispute, the NLRB stated in language quoted with approval by the First Circuit therein at p. 584:

> "Every encouragement should be given to the making and enforcement of such (arbitration) clauses. But, if the employees may effectively call upon the Board to protect them when they arbitrarily breach clear and binding arbitration clauses of this kind, and turn to the use of economic force over the settlement of grievances rather than to the contractual, quasi judicial procedure, the effect will be to discourage the making of, and the adherence to, contractual arbitration procedures. To hold that a strike in furtherance of such a material breach of a complete and binding contractual arbitration clause is to be protected by this Board would be contrary to the labor policy embodied in the National Labor Relations Act as interpreted by the Courts of Appeals and the Supreme Court."

The *Mead* decision was also followed in *Gay's Express, Inc.* v. *International Brotherhood of Teamsters*, 169 F. Supp. 834 (D. Mass. 1959) in which the Court stated at p. 836:

> "Defendant having violated its contract by going to strike and refusing to follow the grievance procedure cannot now contend that plaintiff is barred from asserting its right to recover damages by an action in this court and must refer the question of the strike itself to the grievance procedure."

These cases thus make it abundantly clear that irrespective of the scope of the arbitration clause, the resort to economic pressure rather than the utilization of contractual grievance and arbitration procedure, by its very nature bars the Union from compelling arbitration of its own illegal strike action.

What is urged here is that a no-strike clause is the very heart of a collective bargaining agreement, and irrespective of the rationale, violation of such clause is not arbitrable.

Thus, in *Lodge No. 12* v. *Cameron Iron Works*, 257 F. 2d 467 (5th Cir.), *cert. denied*, 358 U. S. 880 (1958), the Fifth Circuit stated the rule that controversies are not arbitrable when such controversies fall in any one of three categories. That is (at p. 471):

> "* * * where the controversy in question is specifically excluded, where because of a listing of many arbitrable incidences, the instant controversy is impliedly excluded, and where the controversy or grievance concerns violation of a 'no-strike clause'."

See also *Refinery Employees Union* v. *Continental Oil Co.*, 268 F. 2d 447 (5th Cir.), *cert. denied*, 361 U. S. 896 (1959).

Here again it is made clear that breach of the no-strike clause is not subject to arbitration irrespective of the broadness of the grievance and arbitration provision.

The *Cameron* rule has been specifically followed as recently as September 1959 in *Cuneo Eastern Press, Inc.* v. *Bookbinders Union*, 176 F. Supp. 956 (E. D. Pa. 1959) where the Court quoted the rule with approval.

In *Structural Steel & Ornamental Iron Association* v. *Shopmens Local Union*, 172 F. Supp. 354 (D. N. J. 1959) the Court also quoted with approval the *Cameron* rule

that breaches of no-strike provision are by their very nature not arbitrable. The Court stated (p. 360):

> "I find that the contract between the parties did not expressly contemplate that such issue of damages was a dispute or controversy to be settled by grievance and arbitration procedures. Further, since this issue concerns a violation of the no-strike clause it is not a grievance referable to arbitration."

It is significant to note that *Structural Steel* was cited approvingly by this Court in *United Steelworkers v. American Mfg. Co.*, 363 U. S. 564, 567, n. 4 (1960).

Similarly Solicitor General Cox has recently stated in "Reflections upon Labor Arbitration," 72 Harv. L. Rev. 1482, 1484 (1959):

> "The *Lincoln Mills* decision established three fundamental rules.
>
> (1) Section 301 requires the judiciary to develop a federal substantive law of collective-bargaining agreements derived from the provisions and policies of the NLRA, general legal principles and other appropriate sources.
>
> (2) One of the rules embodies in this federal law of collective-bargaining agreements is that an agreement to arbitrate disputes arising under the agreement is binding and enforceable by a decree for specific performance.
>
> (3) The Norris-LaGuardia Act, which restricts the power of the federal courts to issue injunctions in labor disputes, is not applicable to a union's suit for specific performance of an employer's promise to arbitrate.
>
> These rulings establish the machinery necessary for the effective judicial enforcement of agreements to arbitrate and arbitration awards *except when a union resorts to a strike upon an arbitrable grievance.*" (Emphasis supplied.)

It is readily apparent from the second rule set forth above that in so far as motions to compel arbitration are concerned, Solicitor General Cox understood *Lincoln Mills* to specifically sanction their availability. Consequently, when Solicitor General Cox excepts from the direct impact of these rules the situation of a union's strike in the face of an arbitrable grievance, it seems clear that he, too, recognizes that compelling arbitration is not the answer to such a strike. He clearly recognizes the fundamental inconsistency of arbitrating such a strike. This fundamental inconsistency makes it evident that an action under 301 for the breach of the no-strike provision is the answer.

The cases which deal with the problem of the arbitrability of the violation of a no-strike provision in the terms of the scope of the arbitration clause, do not disagree with the above rationale but merely reach the same result by a different route. For example, in *Markel Electric Products, Inc.* v. *United Electrical Workers*, 202 F. 2d 435, 437 (2nd Cir. 1953), the Court stated that as to the question of whether the strike relieved "the company of any duty it otherwise would have had under the contract to submit to arbitration (need not be decided) * * * since we do not think that the dispute here involved is within the scope of the arbitration clause".

Conversely, where a court relied on the "inherent inconsistency" rationale, it saw no need to discuss the "scope of the arbitration clause" rationale.

Thus, in *W. L. Mead* v. *International Brotherhood of Teamsters*, 129 F. Supp. 313, at 315, n. 3 (D. Mass. 1955), the Court stated:

> "It is not necessary to reach the question of whether a strike was arbitrable matter under the contract."

See also *Gay's Express, Inc.* v. *International Brotherhood of Teamsters, supra* (alternative holdings).

In this connection, Judge Ryan, in his decision herein, which was reinstated by the Court of Appeals for the Second Circuit *en banc,* stated that

> "Plaintiff next contends that, even if arbitration be mandatory by violating one clause of the agreement defendants waived their rights under another clause (arbitration). We can find no logical basis for this argument, since if this premise were sustained, every violation of a collective bargaining agreement would act as a waiver of the violating party's right to arbitration, and this would destroy all arbitration agreements which are looked upon with great favor." (R 21)

We respectfully submit that everything that we have said above, everything this Court has said in the *Lincoln Mills* and *Warrior & Gulf* cases, and everything stated by the framers of Section 301 in the legislative history, demonstrates that the grievance and arbitration machinery and the no-strike provision are not wholly independent clauses but bear an intrinsic, inevitable and inextricable relationship to each other. Indeed, many courts have held that the resort to self help, even in the absence of a specific no-strike clause, constitutes a violation of a grievance and arbitration provision.

There can be no question that the waiver or estoppel or inherent inconsistency here involved, does not permanently preclude arbitration or affect any other clause in that contract, but is restricted merely to the very violation of the arbitration procedure for which this 301 action is brought. We cannot over-emphasize that the basic considerations we have herein set forth apply only to the core no-strike and no-lockout provisions. To the extent that Judge Ryan implies otherwise, he has, it is respectfully submitted, totally misconstrued our argument.

III

The grievance and arbitration procedure here involved does not encompass the breach of the no-strike provision.

In general, when a grievance and arbitration provision is inserted into a collective bargaining contract, it is designed to resolve the myriad of day-to-day questions which arise in any industrial establishment—should Employee A be discharged, should Employee B receive holiday pay, at what rate of pay should Employee C be compensated, is Employee D entitled to a leave of absence, what are the shop rules that govern a new method of operation, and the like. The typical grievance and arbitration provision like the one in the contract here in issue provides first for a discussion of any grievance at the local shop level. Thereupon the question is sent to increasingly higher levels of authority for both the union and the employer. If agreement is not possible at the highest level, it is then submitted for arbitration.

Obviously, this mechanism would be completely unsuited for resolving such a fundamental question as the breach of a no-strike clause. Further as pointed out in Point I, an arbitrator is not likely to impose the necessary sanctions for a violation of the no-strike clause. Accordingly, the parties could not have intended that the grievance and arbitration provisions should apply where they are entirely unsuited—namely to breaches of the no-strike clause. As the Second Circuit stated in *Markel Electric Products, Inc.* v. *United Electrical Workers*, 202 F. 2d 435, 437 (2d Cir. 1953):

> "The whole tenor of the contract was to lay a groundwork of agreement as to wages, hours and

> conditions of employment and to provide a peaceful method for the settlement of grievances and disputes over the meaning and application of the agreement with respect to those matters. If efforts in accordance with the procedure of Article VIII proved to be ineffective, resort might be had to Article IX, which provided that an unsettled dispute or grievance was to be submitted to arbitration '* * * upon written notice of the party filing the grievance * * * to be served upon the other party within five (5) days after the meeting referred to in the third step of the grievance procedure outlined above.' The quoted language shows clearly that arbitration was to be but a fourth step in the grievance procedure, and as such the subject matter to which it is applicable is no broader than that to which the first three steps applied. The dispute as to whether the union was justified in calling the strike is one certainly not capable of resolution at a conference between an employee or a department steward, or both, and a department foreman; or between the chief steward and the general superintendent. It is, therefore, not the kind of dispute which was intended to be resolved by submission to arbitration".

Similar results have been reached in every other Circuit that has considered this matter. These cases were collated in the original decision of the Court of Appeals herein as follows:

> "Support for this conclusion is to be found in *Markel Electric Products, Inc.* v. *United Electrical, Radio & Machine Workers*, 2 Cir., 202 F. 2d 435, 437, which held that the alleged breach of the no-strike provision was not 'within the scope' of an arbitration clause which we read as at least as broad as the one before us. Our conclusion also

accords with decisions in a number of other circuits.

"5. *International Brotherhood of Teamsters, Local No. 25* v. *W. L. Mead, Inc.*, 1 Cir., 230 F. 2d 576; *Lodge No. 12, Dist. No. 37, I.A.M.* v. *Cameron Iron Works, Inc.* 5 Cir., 257 F. 2d 467, 471, *cert. denied*, 358 U. S. 880; *International Union, UAW* v. *Benton Harbor Malleable Industries*, 6 Cir., 242 F. 2d 536; *Hoover Motor Express Co.* v. *Teamsters Local No. 327*, 6 Cir., 217 F. 2d 49; *Cuneo Press, Inc.* v. *Kokomo Paper Handlers' Union No. 34*, 7 Cir., 235 F. 2d 108. Also in accord are two decisions of the Fourth Circuit which were disapproved by this court in *Signal-Stat Corp.* v. *Local 475, United Elec. Workers*, 2 Cir., 235 F. 2d 298, *cert. denied*, 354 U. S. 911, discussed infra. See *United Elec. Workers* v. *Miller Metal Prods., Inc.*, 4 Cir., 215 F. 2d 221; *International Union United Furniture Workers* v. *Colonial Hardwood Flooring Co.*, 4 Cir., 168 F. 2d 33." (R 44).

The Court then went on to discuss an earlier case in the Second Circuit, *Signal-Stat Corp.* v. *Local 475*, 235 F. 2d 298 (2d Cir., 1956), *cert. denied*, 354 U. S. 911 (1957), in which a 301 action for breach of a no-strike clause was stayed pending arbitration. After distinguishing that case on its facts, the Court went on to consider the treatment of the *Signal-Stat case* in other Federal courts as contrasted with the treatment of *Markel Electric Products, Inc.* v. *United Electrical Workers, supra*, quoted above.

> "While *Signal-Stat* has frequently been cited and followed for other rules there enunciated,[6] our research reveals only two District Court cases in which it was relied upon to hold that an alleged breach of a no-strike clause is an arbitrable issue,[7] and only one other in which that part of the *Signal-*

"6. E.g., Judge Learned Hand's opinion in *Counsel of Western Elec. Tech. Employees—Nat'l* v. *Western Electric Co.*, 2 Cir., 238 F. 2d 892, 895.

"7. *Tenney Engineering, Inc.* v. *United Elec. Workers, Local 437*, D.C.D.N.J., 174 F. Supp. 878; *Armstrong-Norwalk Rubber Corp.* v. *Local Union No. 283, United Rubber Workers*, D. C. D. Conn., 167 F. Supp. 817.

Stat opinion was cited with approval,[8] although several courts, in post *Signal-Stat* cases, have followed *Markel*.[9]

"8. *Butte Miners' Union No. 1* v. *Anaconda Co.*, D. C. D. Mont., 159 F. Supp. 431.

"9. *Lodge No. 12, Dist. No. 37, I. A. M.* v. *Cameron Iron Works, Inc.*, 5 Cir., supra, note 4; *International Union, UAW* v. *Benton Harbor Malleable Industries*, 6 Cir., supra, note 4; *Gay's Express, Inc.* v. *International Brotherhood of Teamsters, Local No. 404* D. C. D. Mass., 169 F. Supp. 834; *Structural Steel & Ornamental Iron Ass'n* v. *Shopmens Local Union No. 545*, D. C. D. N. J., 172 F. Supp. 354. The conflict between *Structural Steel, supra*, and *Tenney Engineering, supra*, note 6, has not yet been resolved by the Third Circuit." (R 45)

In addition to the cases cited by the Second Circuit, there have been two other decisions by District Courts in the Third Circuit prior to the original decision herein denying a stay pending arbitration in actions for breaches of a no-strike clause. *Harris Hub Bed & Spring Co.* v. *United Electrical Workers*, 121 F. Supp. 40 (M. D. Pa. 1954) and *Metal Polishers* v. *Rubin*, 85 F. Supp. 363 (E. D. Pa. 1949).

But, further, in addition to the companion case of *Sinclair Refining Co.* v. *Atkinson, No. 434*, since the original decision was issued and before it was withdrawn by the decision *en banc*, it was specifically cited and followed by a Court of Appeals and a District Court: *Vulcan Cincinnati, Inc.* v. *United Steelworkers*, 289 F. 2d 103 (6th Cir. 1961); *Yale & Towne Mfg. Co.* v. *Local Lodge No. 1717*, 194 F. Supp. 285 (E. D. Pa. 1961), *appeal to Third Circuit pending*.

Thus the First, Fourth, Fifth, Sixth and Seventh Circuits have held the breach of a no-strike clause not to be within the scope of an arbitration charge. This near universality of opinion clearly indicates that the breaches of the no-strike clause were just not intended to be covered by the arbitration provisions in a contract.

As pointed out by the decisions in *Sinclair Refining Co., Vulcan-Cincinnati, Inc.* and *Yale & Towne Mfg. Co., supra*, these decisions were in no way changed by the decisions of this Court in the three *Steelworkers* cases.[10] None of the *Steelworkers* cases changed the basic rule that the scope of the coverage of any arbitration clause is for the courts and not the arbitrator to decide. Since these earlier decisions rest only on the scope of the particular clauses involved they cannot be affected by the *Steelworkers* cases. Thus the Sixth Circuit in *Vulcan-Cincinnati, Inc., supra*, stated at pages 107, 108:

> "Defendant argues, however, that Benton Harbor and like decisions in other circuits should no longer be considered as controlling authorities in view of three cases decided by the United States Supreme Court in June of 1960, namely, United Steelworkers of America *v.* American Mfg. Co., 363 U. S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403; United Steelworkers of America *v.* Warrior & Gulf Navigation Co., 363 U. S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409; and United Steelworkers of America *v.* Enterprise Wheel & Car. Corp., 363 U. S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424. While, indeed, these decisions indicate that the widest scope should be given to arbitration as a means of settling and composing industrial strife, they are not in point with the issue before us. All of them have one basic difference from our case in that none of them involved the question of whether a violation of a no-strike clause of a collective bargaining agreement is an arbitrable issue. In each of these cases, the court was considering arbitrability of unsettled grievances initiated by employees or on their behalf by representatives of their Union.

10. *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); and *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

> Although these cases extend the scope of arbitration, they adhere to certain well established principles. First, that no contracting party can be compelled to submit to arbitration any matter which he has not agreed to submit. United Steelworkers of America *v.* Warrior & Gulf Navigation Co., supra, 363 U. S. at page 582, 80 S. Ct. at page 1353. Second, the question of whether a particular matter is arbitrable is for the courts to decide. United Steelworkers of America *v.* Warrior & Gulf Navigation Co., supra, 363 U. S. at page 583, note 7, 80 S. Ct. at page 1353. Likewise, Justice Douglas supports the proposition that grievances, in situations with which we are dealing, relate to grievances of employees. At page 584 of Warrior & Gulf Navigation, 80 S. Ct. at page 1354, he says, "Every grievance in a sense involves a claim that management has violated some provision of the agreement." It cannot be said, therefore, that these cases and the principles enunciated therein conflict with our holding in Benton Harbor, nor do they change our conclusion that in the case before us a violation of the no strike clause was not a matter to be submitted to arbitration."

But, moreover, as we have discussed in Point I above, the *Steelworkers* cases, and particularly *Warrior & Gulf Navigation Co.* represent but one side of the coin. They merely enforced the quid pro quo that the union receives for entering into a collective bargaining agreement, namely, the arbitration of all disputes arising during the period of the contract. This case presents the other side of the coin, the quid pro quo that the employer receives, namely, the foregoing of the union's right to strike during the period of the contract. In the *Steelworkers* cases and *Lincoln Mills*, this Court protected the union's rights under this bargain. We now call upon this Court

to enforce the employer's rights under the very same bargain.

But furthermore, whenever a court has to consider the interpretation of language of a collective bargaining agreement, no matter how broadly or narrowly stated, it must always be guided by the basic realities of labor relations and the fundamental policy of preventing industrial warfare. This is particularly true whenever the basis for the court's jurisdiction is Section 301, a statute specifically enacted for the purpose of preventing industrial warfare.[5]

The importance of viewing the language in a collective bargaining agreement in such a context was recognized by this Court in *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270 (1956). In that case, an employer contended that an absolute no-strike clause without any possible qualification whatsoever, to wit:

> "5. The Union agrees that during the term of this agreement, there shall be no interference of any kind with the operations of the Employers, or any interruptions or slackening of production of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppage during the term of this agreement."

deprived a union of its right to go on strike in response to various unfair labor practices committed by the employer aimed at destroying the union's representational

5. "The Labor-Management Relations Act of 1947 represented a far-reaching and many-faceted legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process. It was recognized from the outset that such an effort would be purposeless unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored. Section 301(a) reflects congressional recognition of the vital importance of assuring the enforceability of such agreements." *Charles Dowd Box Co.* v. *Courtney*, —— U. S. —— (No. 33, Feb. 19, 1962)

status. This Court rejected that argument, holding that despite the absolute nature of the no-strike clause there were certain qualifications implicit in it by the very nature of labor relations. In other words, it sustained the right of the union to strike under such conditions, unless the union explicitly abandoned its right to strike against an unfair labor practice by express language in the agreement.

The converse of this situation is presented here. Whereas the preservation of a union's integrity as the bargaining agent for a group of employees is the most fundamental concern of any union during the life of a collective-bargaining agreement, so the continuance of production uninterrupted by strikes is the most fundamental concern of any employer during the life of a collective bargaining agreement. Just as this Court held that a union did not abandon its right to strike (notwithstanding an absolute no-strike clause) in the face of an employer's attempt to destroy its bargaining status, without explicit language specifically stating such abandonment, so we submit it follows that an employer does not abandon its right to seek judicial redress (notwithstanding a broad arbitration clause), in the face of a union instigated strike in violation of the collective bargaining contract, without explicit language specifically stating such abandonment. Thus, even if we were to ignore all other indications that the arbitration clause was just not intended to cover breaches of the no-strike clause, we would be led to that conclusion by the fundamental statutory policy of maintaining industrial peace.

CONCLUSION

For all the reasons stated herein, the judgment of the Court of Appeals for the Second Circuit should be reversed, and this case remanded to the United States District Court for the Southern District of New York, for trial.

Respectfully submitted,

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